ITT Lighting Fixtures, Division of ITT Corporation *and* Harry Merriweather, Jr., Terry B. Williams, and Jo Ann Gray. Cases 26-CA-7792, 26-CA-7781, and 26-CA-7710

April 20, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On December 28, 1979, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein.

The Administrative Law Judge found, and we agree, that Respondent's refusal to grant employee Terry Williams' request for a representative during an interview which Williams reasonably might have believed would result in his discipline was unlawful.

It is undisputed, as the Administrative Law Judge found, that on a Friday in late April 1979, Williams clocked out at 3:30 p.m., a half hour before his regular workday ended, and was thereafter seen by Plant Manager Otto Payonzeck distributing union leaflets on the sidewalk near the main plant.[2] Payonzeck confronted Williams and asked what he was doing at Southaven. He called the personnel office at the Memphis facility to see if Williams had permission to be at Southaven.

Williams testified that the next workday he was called into a meeting with Supervisors Robert Fisher and Jo Ann Gray and Personnel Administrator Mike Harless. As soon as Williams arrived at the meeting he asked to be permitted to call another employee into the room as a witness but Harless told him it was not necessary since they were only going to ask him some questions and therefore he did not need a witness. Williams asked to use the telephone. This request was also denied. Respondent's officials then proceeded to ask Williams questions about what he did when he left work early the previous workday. The questioning lasted approximately 15 minutes. Williams refused to answer any questions. According to Williams, the only statement he made during the meeting was, "the majority of them I told him it was none of his business." He was then permitted to leave the meeting but was told to return at 10 a.m. Williams took a break and called the Board's Regional Office. At 10 o'clock he returned to the meeting as instructed and was told that he was being suspended for 3 days.[3]

Fisher, who testified for Respondent, stated that on the morning of the day Williams was suspended, he met with Harless, to determine how Williams was to be disciplined. Gray and Harless discounted Gray's suggestion that Williams be terminated and instead it was decided to suspend him for 3 days. Harless then asked Fisher to summon Williams so that they could inform him of their decision.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

The Administrative Law Judge found, and Respondent admitted, that Jo Ann Gray was transferred from Respondent's Southaven facility to its Memphis warehouse to curb her union activities. In so finding, the Administrative Law Judge rejected Respondent's defense that at the time of her transfer Gray was a supervisor within the meaning of the Act and therefore unprotected by the Act. Consequently, the Administrative Law Judge found that her transfer violated Sec. 8(a)(3) and (1) of the Act as alleged in the complaint. We agree with these findings for the reasons stated by the Administrative Law Judge, and accordingly, find no merit to Respondent's contentions that it had a "mixed motive" in transferring Gray in that, besides her union activities, Respondent transferred her "to cross-train" her and another group leader "so that there would be a qualified person (probably Gray) eventually to fill a new foreman's position." Thus, in pressing its "mixed motive" contentions, Respondent limits its argument to its claim that Gray was a supervisor at all times material herein. It does not assert that Gray's transfer would have occurred on December 4, 1978, as it did, even if she had been an employee, or in that capacity she then would have been transferred regardless of her union activity. Consequently, we find that there is no basis for Respondent's assertion that Gray's transfer was motivated by a lawful as well as an unlawful reason.

Nevertheless, assuming *arguendo* that Gray's transfer *as an employee* was in part motivated by a desire to groom her for a foreman's position in Memphis, we still would find that a violation occurred. Applying our analysis in *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), we find that the General Counsel has carried his burden of establishing a *prima facie* case and that Respondent has failed to show that absent Gray's union activities her transfer would have taken place on the day it did. Respondent has conceded that it then transferred Gray to curb her union activities among the Southaven employees, its larger facility. It does not assert that the tranfer, otherwise, would have occurred at that time. Further, Gray's uncontradicted testimony is that when she was transferred she was told it was because of her union activities, and she was not promoted to a supervisory position at Memphis until April 1979, or 4 months after her transfer. In light of Respondent's claim that the nature of Gray's work before and after the transfer did not change, the need for such a long period of training is unexplained. Accordingly, we conclude that if Respondent had argued that even as an employee Gray's transfer was for a dual purpose, that transfer would not have occurred on December 4 absent her prounion sympathies.

[2] Respondent's main facility is in Southaven, Mississippi. Williams worked at Respondent's Memphis warehouse, 8 miles from the main facility.

[3] The complaint does not allege and the General Counsel specifically disavowed any contention that the suspension was unlawfully motivated.

Accordingly, and as the issue was not litigated, we do not adopt the Administrative Law Judge's comments regarding the suspension to the extent that he implies that Respondent disciplined Williams because of his union activity.

We note that the Administrative Law Judge inadvertently referred to the date Williams was suspended as April 28. The correct date is April 30.

Fisher further testified that after Williams came into the meeting, he asked for a witness. Harless told Williams that it would not be necessary. Williams asked to use the telephone and Harless told him that that too was unnecessary because Respondent was not going to fire him, but suspend him. Fisher also testified that Harless told Williams that they merely wanted to talk to him. Moreover, Fisher testified, without stating that one or two meetings were held with Williams, that shortly after the conversation began Williams was informed of his suspension, and that thereafter he was questioned about his rule infraction but refused to answer the questions.

Gray testified consistently with Fisher. Her testimony differed only slightly from Fisher's in that she recalled Harless telling Williams, after denying his request to use the telephone, that he was being suspended for 3 days while Harless investigated the matter further. She also did not indicate whether there was more than one meeting.

Harless, who conducted the meeting, did not testify.

The Administrative Law Judge did not specifically credit the testimony of Williams over that of Fisher and Gray or *vice versa*. Nevertheless, in setting forth the events leading to Williams' suspension, it is apparent that the Administrative Law Judge relied heavily on Williams' version, as he found, in accord therewith, that there were two meetings, and the discipline was imposed at the second one. In any event, the Administrative Law Judge found that the case fell within the ambit of *N.L.R.B.* v. *J. Weingarten, Inc.*,[4] and he thus concluded that by denying Williams' request to have a witness present at the interviews Respondent violated Section 8(a)(1) of the Act.

Respondent contends, *inter alia*, that the interview was not unlawful under the principles set forth in *Weingarten, supra*, relying on the testimony of Fisher and Gray that the decision to suspend Williams had been made before he was called into the meeting and that the only purpose of the discussion with him was to inform him of his suspension. Respondent contends, therefore, that this was a disciplinary interview and that accordingly under *Baton Rouge Water Works Company*,[5] no *Weingarten* rights attached to Williams' request. For the reasons discussed below, we find no merit in Respondent's contentions, and in agreement with the Administrative Law Judge find the violation.

Under either version of the events, that is, Williams' or Fisher's and Gray's, we find that the decision in *Baton Rouge* does not sustain Respondent's position. If Williams' testimony is believed, Respondent's contention, that a final decision to discipline him was made prior to the first interview, is not supported by the evidence. Thus, at that meeting Williams was questioned about his leaving work early the previous workday, but there was no statement made by Respondent that indicated that Respondent already had decided to discipline him. Indeed, the decision to suspend him was not announced until the second meeting. In these circumstances, we find that the initial interview of Williams was investigatory in nature, as from his account there is no indication that a final decision had been made as to whether or not to suspend him, albeit it was evident that a possibility of discipline existed and Williams clearly was aware of that both before, and certainly after, the first meeting. Consequently, accepting Williams' account, *Baton Rouge* is inapposite. We find therefore that in requesting representation during the first interview, Williams was exercising his Section 7 rights under *Weingarten*, and that Respondent, in denying his request, violated Section 8(a)(1) of the Act.[6]

We reach the same result if Fisher's and Gray's testimony is believed, and thus Respondent actually did make the decision to discipline Williams in advance of conducting the interview with him, there was only one meeting at which the suspension was announced, and the sole purpose in calling the meeting was to inform Williams of his suspension. Under their version, like that of Williams, Respondent's representative, after advising Williams of his suspension, engaged in some 10 to 15 minutes of conversation with him concerning his activities after he left early the previous workday. In these circumstances, whatever Respondent's reasons for questioning Williams after having allegedly made the decision to discipline him, once Respondent clearly began its questioning, the interview went beyond the prescribed limits contemplated by the Board majority in *Baton Rouge*. For as the majority in *Baton Rouge* emphasized:

> . . . were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect . . . such conduct would remove the meeting from the narrow holding of the instant case, and the employee's right to union representation would attach.[7]

[4] 420 U.S. 251 (1975).

[5] 246 NLRB 995 (1979).

[6] See *Coyne Cylinder Company*, 251 NLRB 1503 (1980).

[7] 246 NLRB at 997.

Thus, accepting Fisher's and Gray's testimony, we also find that Williams' *Weingarten* rights were violated, since regardless of the intended purpose of the interview, Respondent clearly exceeded the bounds of *Baton Rouge*, and thereby violated Section 8(a)(1) of the Act by denying Williams' request to have a representative present.[8]

With respect to the remedy, the Administrative Law Judge ordered Respondent to expunge from its records any reference to Williams' suspension and to grant him backpay for the period he was suspended. We do not agree that a make-whole remedy is warranted in the instant case. As we stated in *Kraft Foods, Inc.*,[9] the General Counsel may make a *prima facie* showing that a make-whole remedy is appropriate for a violation of an employee's *Weingarten* rights by proving that a respondent "conducted an investigatory interview in violation of *Weingarten* and that the employee whose rights were violated was subsequently disciplined for the conduct which was the subject of the unlawful interview. . . . [I]n order to negate the *prima facie* showing of the appropriateness of the make-whole remedy Respondent must demonstrate that its decision to discipline the employee in question was not based upon information obtained at the unlawful interview." We conclude that in the instant case, Respondent has met this burden under any version of the events in question.

While, as discussed above, we adopt the Administrative Law Judge's findings that Williams' *Weingarten* rights were violated, we do not find that Respondent's decision to discipline Williams was based on information it obtained at the unlawful interview. Williams, by his own admission, refused to answer questions, and thus Respondent did not glean any information from the interview. Accordingly, we conclude that Respondent has negated the *prima facie* showing of the appropriateness of a make-whole remedy since its decision to discipline the employee was not based on information obtained at the unlawful interview. We therefore find that the make-whole remedy ordered by the Administrative Law Judge is unwarranted[10] and that a cease-and-desist order is appropriate.[11]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, ITT Lighting Fixtures, Division of ITT Corporation, Southaven, Mississippi, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, transferring, or in any other manner discriminating against its employees because of their prounion activities.

(b) Questioning employees as to their union sympathies, threatening to discriminate against employees in retaliation for their union activities, telling employees that their attempt to be represented by a union would be futile.

(c) Refusing to permit any employee, upon request, to have a witness present during an interview where the employee has reasonable grounds to believe that the matter to be discussed may result in his being disciplined or, where the employee is informed that disciplinary action is being taken against him and in the same interview either before or after being so informed he is questioned about the matter for which discipline is imposed.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the right to self-organization, to form, join, or assist United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other labor organization, to bargain collectively through representatives of their own

[8] In any event, regardless of *Baton Rouge's* applicability, based on his separate dissent in that case, Member Fanning would find that Respondent violated Williams' *Weingarten* rights.

[9] 251 NLRB 598 (1980).

[10] We also find that expungement of the disciplinary action taken against Williams is not justified in those circumstances.

[11] Our dissenting colleague refers to Williams' refusal to answer questions as "information" obtained at an unlawful interview, requiring that Respondent demonstrate that it did not rely on this "information." This is a distortion of the term "information" which improperly places the burden of persuasion on Respondent. Williams' refusal to answer was an action which did not impart information in the normal sense. Compare *Ohio Masonic Home*, 251 NLRB 606 (1980), where the Board found that a make-whole remedy was appropriate because discipline was based not only on the subject under investigation, but also on the employees' failure at the interview to furnish a satisfactory explanation of complaints made by her supervisor. There, the employee divulged information by giving an explanation which Respondent found unsatisfactory. Here, however, Respondent recieved no such information from Williams; instead, it merely learned that he refused to answer questions after his request for representation was denied. To find, as our colleague appears to suggest, that every refusal to answer questions in a *Weingarten* type interview constitutes "information" concerning the subject matter of the interview, is to ignore the plain meaning of the word. Further, under *Weingarten*, if an employee refuses an interview without a representative, the employer is free to proceed as it chooses as long as it does not base discipline on the refusal. To establish that an employer has outstepped his rights in this area, the General Counsel must make a *prima facie* showing that discipline was imposed for refusing to participate in an interview. The General Counsel has not made or attempted to make such a showing in this case. The dissent would relieve the General Counsel of this responsibility by categorizing the refusal as "information" obtained at the interview, bring it within the *Kraft Foods* analysis for determining the appropriate remedy for a *Weingarten* violation.

The Administrative Law Judge recommended that Respondent be ordered to cease and desist from violating the Act "in any other manner." However, the Board held in *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979), that his broad cease-and-desist language is warranted only in cases where "a respondent is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Considering Respondent's unfair labor practices in light of this standard, we conclude that a broad order is not appropriate in this case and shall accordingly order Respondent to cease and desist from violating the Act "in any like or related manner."

choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Harry Merriweather and Jo Ann Gray immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

(b) Make whole Harry Merriweather for any loss of pay or any benefits he may have suffered by reason of Respondent's discrimination against him, with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and the *Florida Steel Corporation*, 231 NLRB 651 (1977).[12]

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its places of business in Southaven, Mississippi, and Memphis, Tennessee, copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 26, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by it to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 26, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

MEMBER JENKINS, dissenting in part:

For the reasons stated in my partial dissent in *Kraft Foods, Inc.*,[14] I would order a "make whole" remedy whenever it has been established that an employee has been disciplined for conduct which was the subject of an interview conducted in violation of *Weingarten*.[15] Since such was the case herein with regard to employee Williams, I would order the payment to him of 3 days' backpay, with interest, without engaging in any further analysis as to whether Respondent has established that its decision to suspend Williams was not based upon information obtained at the unlawful interview; I engage in such analysis herein only because my colleagues consider it pivotal in resolving this matter.

My reservations regarding my colleagues' application of the *Kraft Foods* test to this case are twofold: (1) my colleagues have improperly allocated the burden of proof as to Respondent's reliance upon "information" obtained at the unlawful interview of Williams; and (2) they have ignored significant evidence in the record indicating the pretextual nature of the reason asserted by Respondent for its suspension of Williams.

As to the manner in which my colleagues have allocated the burden of proof under *Kraft Foods*, footnote 11, *supra*, clearly places the burden upon the General Counsel to establish by affirmative evidence that, in making the decision to discipline Williams, Respondent relied upon the fact that he refused to answer any questions asked at the unlawful interview. The fact that Williams would refuse to answer the questions asked at the unlawful interview was not known prior to that interview. Thus, that fact is "information" which was obtained at the unlawful interview, and as such, the burden under *Kraft Foods* is upon Respondent to show nonreliance upon such "information" rather than upon the General Counsel to show reliance.[16] Furthermore, an additional piece of "information" on which Respondent has failed to establish its nonreliance is the fact that Williams would be impertinent and tell his interrogators that the answers to their questions were "none of [their] business."

Although the foregoing provides an adequate basis for a full make-whole remedy, there is a more compelling reason to provide such a remedy in this matter: the pretextual nature of the reason asserted by Respondent for its suspension of Williams. Respondent asserts that it suspended Williams for leaving work a half hour early one day. Williams

[12] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[14] 251 NLRB 598.

[15] *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251.

[16] My colleagues say that this distorts the term "information" in a manner which improperly places the burden of persuasion on Respondent; however, it is they who improperly limit the term to mean only affirmative evidence; in the process, they have significantly altered the thrust of the Board's decision in *Kraft Foods, Inc., supra*. It is clear that my colleagues have confused Respondent's burden under *Kraft Foods*, a remedial issue, with the General Counsel's burden of proof in an unfair labor practice case involving discipline of an employee because of his protected activity. Cf. *Kahn's and Company, Division of Consolidated Foods Co.*, 256 NLRB 930 (1981) (concurring opinion). To require the General Counsel to establish affirmatively that Respondent relied upon Williams' refusal to answer questions in order to obtain a make-whole remedy is tantamount to requiring proof of a second, distinct violation of the Act prior to remedying the first.

testified that he received permission to leave work early to conduct some personal business; however, when he found that he was unable to conduct that business, he went to the main plant to distribute union literature. (Williams' supervisor denies that Williams was given such permission and the Administrative Law Judge did not resolve this credibility issue.) While Williams was standing on a sidewalk at the main plant distributing the literature, the plant manager came out to him, grabbed him by the arm, and said that he was taking him to the personnel office because he "didn't have permission to be standing out there." When Williams arrived at work the next workday, he was called into the warehouse office, interrogated in violation of *Weingarten*, and suspended for 3 days "for leaving work early without permission."

Assuming, *arguendo*, that Williams did not receive permission to leave work a half hour early on the day in question, the foregoing facts indicate that Respondent was concerned more with the fact that Williams was distributing literature in front of the main plant than with the fact that Williams left work early "without permission." In light of Respondent's demonstrated union animus, I conclude that Williams was suspended for distributing union literature and that Respondent utilized this allegedly unauthorized early departure from work in an effort to justify an otherwise unlawful suspension.[17]

For the reasons detailed above, I would provide a make-whole remedy for employee Williams; however, my colleagues refuse to do so. Accordingly, I dissent.

[17] I am not as impressed as my colleagues with the fact that "the complaint does not allege and the General Counsel specifically disavowed any contention that the suspension was unlawfully motivated." The *facts* surrounding Williams' discharge were fully litigated at the hearing and, at the close of the hearing, the General Counsel made a motion to conform the pleadings to the proof. (This motion was denied by the Administrative Law Judge; however, in my view it should have been granted.) Under these circumstances, and considering the fact that this matter was litigated before the Board announced, in *Kraft Foods*, the relevance of specific motivation in *Weingarten*-type cases, I do not consider the Board to be procedurally barred from analyzing the motivation underlying Williams' suspension.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT coercively interrogate employees concerning their union sympathies.

WE WILL NOT threaten to discriminate against our employees in retaliation for their having engaged in union activities.

WE WILL NOT tell our employees that any attempt by them to be represented by a labor organization would be futile.

WE WILL NOT deny the request of any employee to have a witness present during an interview where the employee has reasonable grounds to believe that the matter to be discussed may result in his being disciplined, or, where the employee is informed that disciplinary action is being taken against him and in the same interview either before or after being so informed, he is questioned about the matter for which the discipline is imposed.

WE WILL NOT discourage membership in United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or in any other labor organization of our employees by discharging or otherwise discriminating against our employees because of their membership in, or activities with respect to the above or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to join United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, or any other labor organization, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

WE WILL offer Harry Merriweather and Jo Ann Gray immediate and full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges.

WE WILL make whole Harry Merriweather for any loss of pay he may have suffered as a result of our discrimination against him, with interest.

ITT LIGHTING FIXTURES, DIVISION OF ITT CORPORATION

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held on October 9, 10, and 11,

1979, in Memphis, Tennessee, on complaint of the General Counsel against ITT Lighting Fixtures, Division of ITT Corporation, here called the Respondent or the Company. The complaint issued on August 10, 1979, based on charges filed by three individuals, Harry Merriweather, Terry B. Williams, and Jo Ann Gray. The issues presented are whether the Respondent violated Section 8(a)(1) of the Act by coercive statements and threats to employee, and whether it violated Section 8(a)(3) by its discriminatory treatment of employees because of their union activities. Briefs were filed after the close of the hearing by the General Counsel and the Respondent.

Upon the entire record and from my observations of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

At its Southaven, Mississippi, plant the Respondent is engaged in the manufacture of lighting fixtures. Annually from this location the Respondent sells and ships products and goods valued in excess of $50,000 directly to out-of-state locations. During the same period at this location it purchases and receives goods and materials valued in excess of $50,000 directly from out-of-state sources. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, here called the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *A Picture of the Case*

Among the approximately 350 employees of the Respondent at its Southaven plant a union movement was started early in October 1978. On December 14, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, here the called the Union, filed a petition for an election with the Board, and on February 16, 1979, a Board-conducted election took place. Because certain challenges affected the ultimate resolution of the question concerning representation, that matter is still pending before the Board.

Three employees filed the charges against the Respondent, accusing it of a number of unfair labor practices assertedly committed during the self-organizational campaign, both before and after the election. Based on all these charges, the complaint alleges several violations of Section 8(a)(1) of the statute—interrogation, deliberate destruction of an employee's UAW insignia, refusal of an employee's request for union representation during a disciplinary interview, etc. It also alleges that the Respondent discriminatorily discharged employee Harry Merriweather, and discriminatorily transferred two other employees—Terry Williams and Jo Ann Gray—from one location to another, all in violation of Section 8(a)(3).

In its answer the Respondent denies the commission of any unfair labor practices. It admitted, at the hearing, that the transfer of Gray from the main plant to a satellite warehouse 8 miles away had a dual motivation, one of them to curb her prounion activities. Gray was an activist in the union movement, but the Respondent contends she was a supervisor within the meaning of the Act, and that therefore it had a right to treat her any way it wished, even discriminating against her if it so desired. As to this lady, therefore, all that has to be decided is whether or not, at the time of her transfer, she was in fact a supervisor.

Williams was also transferred from the main warehouse in Southaven to the distant, smaller warehouse to do the same kind of work. Was he, too, so transferred because of his union activity? Here the defense is that because of operational changes Williams became an extra, unneeded man where he was, and so was sent to the other place in order to avoid dismissing him altogether. At the second location, months later, William checked out earlier than scheduled one day, and left the place, without permission, according to the Company. For this he was disciplined. Was management's refusal of his request for a witness at the disciplinary interview an illegal denial of his statutory right? See *N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251. (1975).

Merriweather also worked at the main warehouse. In March 1979 he too checked out early and left work. He says he had permission to do this, but his supervisor says he did not. Merriweather was discharged, ostensibly for having violated the rules. Was this the real reason, or did the Respondent use the incident to cover an illegal purpose; i.e., to get rid of him because of his union activity?

As is readily apparent, the case against the Respondent in the transfer of Williams and in the discharge of Merriweather in each aspect presents a question of inference. On the face of things—if what happened and what was said at the time of the two events be viewed apart from all else in the record, a *prima facie* picture of proper conduct by management is seen. If instead the record evidence in its totality be appraised, can it be held there is sufficient oblique proof of antiunion purpose that was hidden by the surface appearance of things?

B. *Violations of Section 8(a)(1)*

1. Merriweather attended several union meetings before the election and wore a UAW button at work. He testified that, a day before the election Lee Shepherd, the supervisor in the main warehouse and overseer of about 20 men there approached him at his work place and started a conversation by saying, "I'm trying to get around to talking to all the—my employees back here in the warehouse. I want to talk to you, too. . . . 'I'm not talking about the Union now. We're having a problem here in the plant. . . . We don't know what it is. . . . What's wrong with the plant?' When Merriweather answered, 'Ain't nothing wrong with the plant,'" Shepherd came back with: "'Well, why are you all voting for a Union? . . . You is voting for a union, ain't you?'" To this Merriweather said that there was nothing wrong with the plant but he was going to vote in favor of the

Union. Again Shepherd asked: "Well, what is it?" Now the employee detailed his reasons—not being sure of a job, getting moved around, the foreman telling the men what to do, etc. Shepherd then said, still quoting from Merriweather's testimony: "We were going to be sorry for that. We ought to get together and talk about it—kind of talk it over because we were going to be sorry about that. We didn't know what we was doing."

Shepherd's version of this talk is that it was Merriweather who started it by saying that if the Company went union he would not be allowed to be off as much as in the past. Shepherd continued that he agreed with the man. "I made the statement that I felt the same as he did that the union couldn't do any more for him than the Company was doing at the present time." Shepherd denied asking Merriweather what he thought of the Union, or how he intended to vote, or saying that anyone would be "sorry" for anything.

I credit the employee witness against the supervisor. This resolution of credibility rests only in part upon the comparative demeanor of the two witnesses at the hearing. It rests also upon the pervasive incredibility of the Respondent's total affirmative defense of discharge for cause when Merriweather was fired a few weeks later, after the election, as will be explained below. I therefore find that by Shepherd's coercive questioning of Merriweather as to his union sympathies, and by his threatening the employee with discrimination in employment in some fashion, the Respondent violated Section 8(a)(1) of the Act.

2. Jerry Hailey is a maintenance mechanic who works under Foreman McElhaney, a conceded supervisor. The two were talking in the office one day a week or so before the election. Hailey testified that McElhaney asked what could the Union do for him that the Company could not. When the mechanic answered that the Union could represent him, McElhaney said: "Aren't you a man? Can't you represent yourself?" Hailey continued to testify that on the day before the election the foreman came to his work bench and told him, "[I]f I wanted to work under a union, why didn't I go to the Ford plant—quit and go to the Ford plant and get me a job pressing out hubcaps." When Hailey responded he did not have to go to the Ford plant because the Union would be in this plant the next afternoon, the foreman "got a little upset and said, 'It ain't no way no union going to get in this plant.'"

Hailey spoke of a third incident involving McElhaney. A number of employees wore caps and tee shirts prominently displaying the letters UAW, Hailey among them. One day, still before the election, a new steam cleaning machine was being operated for the first time in the maintenance department, and several employees were watching to see how it worked. The foreman was also looking on and Hailey was wearing his UAW hat. In Hailey's words: "As he [the new machine operator] got ready to ignite the flame, I backed away from it, and J.W. [McElhaney] laughed, you know, a little. . . . McElhaney . . . said, 'Why are you backing away?' I told him, I said 'Sometimes these things, you know, they might explode or somethimg like that.' . . . About that time, J.W. reached up and grabbed my hat, and said 'Let's burn this hat.' . . . Then he threw it over the stack on the steam cleaner and smoke started coming out. . . . J.W. backed up, and I backed up . . . he ran back up and snatched the hat off and started hitting, you know."

At this point in his story Hailey said that from the now heated new oven he took his damaged hat to the office of Richard Covington, the personnel manager, to report what had happened. Covington took notes, said McElhaney "would have to buy me another hat," and added he would get back to the mechanic. On cross-examination the witness was then brought back to the incident itself, and now added that the moment the foreman realized the unintended damage, he said he was sorry and offered to buy Hailey a new one, but that the employee refused the offer. The witness then also admitted that later the foreman not only bought him a new one, but also gave him $4.15 in cash so he could get still another with the UAW letters. In the end, Hailey was asked by his own lawyer, Edwards:

> Q. The incident where Mr. McElhaney snatched your cap off, did you feel that that was out of playfulness or in fun?
>
> A. Yes.

In his testimony McElhaney denied ever asking any employee, Hailey included, whether they favored the Union, or how they felt about it, or what it could do for them. He did add he talked to all of the employees about the Union, but only to explain his view that the Union had nothing to offer them, that they did not need it, that the Company had an open door policy making it possible for the employees to come in and talk, and that the Union would be no more than an unnecessary middle man.

In the circumstances, considering the record as a whole, again including demeanor, I do believe the foreman also told Hailey the Union would never succeed in becoming established in this plant. His statements that there was no need for the Union, or even that it could be of no substantive value to the employees, may have been a protected expression of opinion. See *Krispy Kreme Donut Corp.*, 245 NLRB 1053 (1979). But when a representative of management tells the employees their efforts at self-organization and union representation are destined to be futile, he trenches upon their freedom guaranteed by the statute. I find therefore that by telling the employee that the broad effort at self-organization and union representation would in any event be frustrated, the Respondent violated Section 8(a)(1) of the Act.

As to the further allegation that by taking a union cap from the employee's head and damaging it, McElhaney commited an unfair labor practice, I shall dismiss it. It was all in fun, and everybody knew it. Not only did Hailey admit this at the end of his testimony, but also he himself described the laughing that went on between himself and other employees right after it happened. Horseplay among the maintenance mechanics was the order of the day—paint fights, pulling shirts out of other peoples trousers, flashing lights in other employees' eyes at work, placing electrically charged capacitators in other people's seats, etc. And besides all this, it is clear

that the foreman did not intend to damage Hailey's cap, for he immediately apologized and offered to replace it. It will not do for the General Counsel to argue that, because the employee chose to scoff at the supervisor's courtesy, the Board should find McElhaney did something illegal that day.

3. A final contention, not alleged in the complaint, is that the plant manager, Otto Payonzeck, illegally coerced an employee when he "tossed" her a small copy of a UAW contract during an employee meeting called by the Company. The Respondent carried on a campaign of its own to defeat the Union in the election. At a meeting of employees called for that purpose, Payonzeck was holding UAW contracts in his hands and explaining why the union benefits were not worth the efforts the prounion people were making. One of the employees—Winnie Williams—shook her head in contradiction. Seeing her attitude, two other employees present—"Dolly," and Dorothy Plemmons—voiced their contrary views by asking her to speak up and explain what the UAW could really do for the employees. With this Payonzeck tossed several copies of UAW contracts towards the employees. Williams was careful to admit he did not "throw" them, but "tossed" them. One fell at her feet, where she sat in the second row, and her neighbor picked it up and handed it to her.

Without comment, I make no unfair labor practice finding based on that incident.

C. *Terry Williams*

Terry Williams worked for almost 2 years as a ballast welder. With time it became too much for him and he asked to be transferred to some other work. He told his supervisors he would accept a transfer to no matter where, because of his health. When an opening developed in the main warehouse he asked for it but was denied because of a rule against two members of the same family working in a single department. At one point he expressly offered to go to work as a material handler at the satellite warehouse 8 miles away, and even told his supervisor he would quit the Company entirely if he were not transferred. Somehow all he got was "a run around" (a phrase from the witness' prehearing affidavit). And all this was before he, or any one else, began any union activity at all.

On October 30 Williams was made happy with a transfer to the Southaven warehouse after a man left that department. This was after he had started union activity, as he admitted at the hearing. It was a straight transfer decided by the Company, what the witnesses called "unilateral," as distinguished from situations where employees bid for job openings. Three weeks later, on November 18, he was transferred, again unilaterally, to the satellite warehouse to do the same kind of work of material handling and at the same rate of pay. There is no question but that the first transfer was management doing Williams a favor. As to the second transfer, the record also shows very clear explanation of why the Company did it. The complaint calls the second transfer illegal discrimination in employment and an unfair labor practice, but it finds no fault with the first transfer.

Materials of all kinds are constantly transported back and forth between the two warehouses, both finished products and new supplies. For some time there were two methods of conveyance; one a tractor, owned by the Company, with eight or nine trailers which go back and forth. The other was a leased truck, operated by a man named Sammie Williams. This man spent about a quarter of his time just loading and handling materials in the main warehouse when not driving on the road, and the rest going back and forth with the leased truck. For reasons of economy—clear and not disputed at the hearing—in early November the Company decided to discontinue use of the leased truck and to transport all materials via its own tractor and trailers. Sammie Williams, with very much seniority in the Company, now no longer having anything to do on the road, was put to work full time in the main warehouse. This meant there was one man too many there. Terry Williams was the least senior and he had to go. An opening came up at the smaller warehouse where a man quit, and the Company decided to transfer him there—again at no loss of pay or change of duty. I suppose the Company could also have put the man back to welding work, but he had said he would quit before doing that.

The facts here stated, about cancellation of the lease on the rented truck, about an extra man resulting here and a timely opening there, reflect the direct testimony. They also reflect precisely the facts which the supervisors stated to Williams at the time of the events as the reason for what they were doing. Not a word was uttered by anyone in the least indicating any other reason, or hidden motive, in the man's transfer. All things considered, I find the evidence insufficient to prove the complaint allegation that the transfer of Williams in November was an illegal discrimination against him resulting from his union activity. It is again essentially a matter of inference. Williams was careful to say no supervisor ever saw him distribute union cards, no supervisor ever asked him did he favor the union. He said he once asked Shepherd, his supervisor in the main warehouse, what did the supervisor think of the union and added, "I talked to him about a union; but I did not say I was supporting the union." If company knowledge of the man's prounion sentiments is to be inferred out of the blue in November, why not also late in October, when it favored him with a transfer he liked?

Now working at the second warehouse 8 miles away from Southaven, on April 28, 1979, Williams was disciplined formally—with a personnel record notice suspending him from work for 3 days and in placing him on probation for an extended period. He had left his place of employment the previous workday at 3:30 p.m. instead of 4 o'clock, as scheduled, punching out too early. He said he had permission to do that; his supervisor, as a defense witness, swore he did not. From the warehouse that day Williams had gone to the main plant where—before or after 4 o'clock?—he was seen distributing union leaflets on the sidewalk. In fact, Plant Manager Payonzeck saw him from the window, came out on the sidewalk, and, in the uncontradicted words of Williams (Payonzeck did not testify) "grabbed ahold of my arm

and told me that he was taking me to Personnel because I didn't have permission to be standing out there."

When Williams arrived in the morning, his next workday, he was called to the office by Mike Hareless, personnel administrator, who had traveled from the main plant to come here expressly for this talk with Williams. Present also were Robert Fischer, supervisor of the warehouse, and Jo Ann Gray, who by this time had also been promoted to supervisory status. As soon as he learned what it was all about Williams asked to be permitted to call another employee into the room to be a witness to what was about to happen. The answer was the managers only intended to ask him questions and that he did not need a witness. His request was simply denied. He then asked to be permitted to use the telephone. Again he was told it was not necessary, and he was refused. Fischer, Williams' immediate supervisor, testified that when refusing the request to use the phone, he told Williams: "We're not firing you or anything. We're going to suspend you." Williams was then asked a great number of questions—for about 15 minutes—about what had happened when he left work early, but he refused to answer any of them. He was told to come back at 10 a.m. He did, and was then told he was being suspended. The next day he was handed the formal disciplinary notice which also went into his file. He lost 3 days' work.

The main reference in the complaint to this entire incident is that the Respondent violated Section 8(a)(1) of the Act by refusing Williams' request to have a witness present at the Monday morning disciplinary interview. There is detailed and unending testimony from witnesses called by both sides about conversations relating to a request for permission to leave early, about investigations conducted by several management representatives into the matter, about what company rules mean, about whether they were or were not applicable to this situation so as to justify this suspension, and even about Williams' past record—did it or did it not warrant the measure of discipline finally imposed? But all this has nothing to do with the issue of whether the Respondent committed the unfair labor practice as alleged in what it did to Williams at that time. If one looks at the plant manager's statement to Williams on the sidewalk criticizing him for distributing union literature, illegally motivated discrimination is strongly indicated. But at the hearing there was no contention that the Company did anything wrong in why it disciplined the man. By the General Counsel on the record: "We are not alleging the incidents that took place between this witness and Mr. Payonzeck as a violation of the Act. The purpose for putting that testimony in—my purpose for doing so was to show that this witness had reasonable cause to believe that he would have the disciplinary action taken against him when he was called into this meeting."

In the discussions among supervisors about alternative proposals as to what disciplinary action should be taken against Williams, Hareless, the Personnel manager, talked about the man having handed out union literature at the main plant. Jo Ann Gray, by that time a regular supervisor herself, then contributed, as she herself testified: "In my opinion, seeing if I was in the authority to fire Terry, I probably would have fired him because I felt like that he was in the wrong handing out union literature on company time. . . ." If the offense was, as the managers kept repeating at the hearing, to have left early without permission, what difference did it make what the man did after leaving? What was really in the mind of management when it discriminated so against Williams? In any event, even were it found that the decision to discipline the man was illegally motivated, the remedy in this case would be the same, for the unfair labor practice that was committed calls for removal of the disciplinary notice from Williams' personnel file, and payment for the 3 days of work he lost.

There therefore is no point in burdening this Decision with all the detailed testimony. What is pertinent, however, is the fact that the Respondent's extraordinary interest and activity in this really minor infraction of the rules, if it was an infraction, seems to show all the more why Williams did have reasonable basis to believe the interview that was about to take place endangered his position as an employee. Actually, the Respondent's argument now that it was no more than an inquiry, a passing preliminary question not necessarily leading to any prejudicial act against the man, fails if only on the basis of the supervisor's statement that the man was going to be "suspended." If this is not the classic situation envisioned by the *Weingarten* principle, I do not know what is.

I find that by refusing the employee's request to have a witness present in this disciplinary interview, the Respondent violated Section 8(a)(1) of the Act. *Glomac Plastics*, 234 NLRB 1309 (1978).

D. *Harry Merriweather*

Merriweather also worked in the main warehouse. He was discharged on March 7 for doing, according to the Respondent, the very same thing Terry Williams did a month later. He left work early, punching out on the clock after working only about 4 hours instead of the scheduled 8. Why was Williams only suspended for 3 days while Merriweather was fired outright?

Merriweather had been asked by his supervisor, before the election, which way was he going to vote, and, when he said very directly he was going to vote in favor of union representation, got the message from Supervisor Shepherd he would "be sorry" if he did. Shepherd is the man who now calls Merriweather a liar, saying he did not give him permission to leave early. Shepherd was also among the management people who talked the matter over at length before sending this employee home for good.

The question of credibility here is twofold. Did Shepherd say Merriweather could leave early if his work were adequately caught up? And if he did not, is it true the reason why he was discharged was because he left work early? Of course, in the end there is always the affirmative burden resting upon the General Counsel to prove the illegal motive. But in the light of the literal threat to retaliate against the employee for his expressed adherence to the Union, and of the Respondent's own antiunion campaign, if the affirmative defense fails, a finding of illegality is fully warranted.

On its face, the total story of the defense witnesses cannot be believed. Covington, the personnel manager over the whole plant, said it was he who made the decision in this instance. Again and again he stressed the point that under the Company's fixed and long-established policy, any employee who clocks out before regular hours is considered to have "quit." This word "quit" was a constant refrain out of his mouth. Indeed, it was virtually impossible to draw an admission from him that he had discharged the man; he kept answering that the man "quit." If, in coherent English, a man has quit his job, that is the end of the matter, and there is nothing else to do or talk about.

But, in complete inconsistency with his basic position, Covington, then went on to detail how he, and his underlings, studied the man's attendance record, to see how often he had been late, how many excused or unexcused absences he had. All this, according to the personnel manager, before it was decided to tell the man he had "quit"! If a man leaves of his own volition he has decided to leave his employment for good—and that is what the word quit means to me. Why should the employer search his record to ascertain how often he had come on time, or how often he had been away? The two ideas simply have nothing to do with one another. As to the extended testimony about Merriweather's old attendance record, Covington was asked had there been a dual reason for the dismissal, and gave a flat no.[1] This means the total defense story was a deliberate attempt to befuddle the record, to distort reality, and, necessarily, to conceal whatever the real motive may have been. In my considered judgment, on this question of the discharge of Merriweather—and discharge is what it was—Covington stands as a discredited witness.

His doubletalk kind of testimony continued even into his explanation of Merriweather's attendance records. Merriweather had one of the worse records during the previous years of all the 12 or 14 employees in his department. He had asked, and been given permission by Shepherd to leave early, many times during that period. He had never once been issued a warning of any kind. In the face of his incomprehensible admission that the man's record was taken "into consideration," and found to be "fairly poor," Covington repeated: "He was separated because he left work without permission." How does an employer "separate" a man, and yet not discharge him?[2]

[1] From Covington's testimony:

Q. And the basis for that decision was that he had walked off the job; that he had quit?

A. That's correct.

Q. And his absentee record had nothing to do with your determination to terminate him?

A. Any time an individual terminates employment, you take work record and attendance into consideration, yes.

Q. Are you telling me now that there was a dual reason for his termination?

A. No, I'm not. The reason for his termination, as a matter of fact, is because he walked off the job.

Q. Well, what does his absentee record have to do with this then?

A. That's always taken into consideration when you have a person that have some longevity with the company.

[2] From Covington's testimony:

Q. Would you have fired Mr. Merriweather under the circumstances of this case if he had a perfect absentee record?

A. Probably not.

The witness spoke at length about excused absences, his purpose, I suppose, to explain away the leniency towards Merriweather preceding his union activities. "Q. I think he asked you if a man goes to the supervisor and says, 'is it OK if I go home?' The fellow says, 'You may,' and he goes home. Now, the lawyer is asking you, isn't that considered an excused absence? The witness: No, sir, it is not." Asked why the man had not been disciplined, or at least given a warning, for absences in excess of what the rules permit, Covington avoided answering.

Merriweather testified that upon arrival early in the morning of March 6, in the presence of Sammie Williams and Lonnie Pitts, he told Shepherd he needed to leave work at 11:30 that day, and that supervisor's answer was, "I don't know." He then discussed with the supervisor the day's assignment, listed in a work order that was Merriweather's special responsibility that day. The witness added that Shepherd then said, "If you catch up with this, you can leave." The witness continued that later, as he worked, Shepherd commented that another employee, Smith, had not yet arrived, and that he, Merriweather, then said he would call another warehouseman, Clarence Pruitt, to see if he could come and help complete the assignment. Again later, still according to Merriweather, Shepherd told him Smith had "made it." When Merriweather then said he would "pull" the rest of the work order so he could leave, Shepherd said: "OK." Merriweather's last item is that at or about 11:30 he told Shepherd he had not been able to do the full job, and was told by the supervisor: "OK." "What you pull, you take out to the line. . . . OK. I'll see you tomorrow then."

Merriweather's card shows he worked 4.15 hours and clocked out at 11:45. He returned at his usual hour the next morning. As to what happened then, there is cumulative testimony by a number of witnesses about one meeting after another, continuing conversations involving Merriweather and his supervisors, among management representatives discussing the big question among themselves, Covington investigating every jot and tittle of asserted statements attributed to others, etc. But whatever happened the next day, whatever the various witnesses said they told one another or heard people say in analyzing the events of the previous day, sheds no significant light on who told the truth about whether Shepherd did or did not give Merriweather permission to leave early. And that is the question which is preliminary to the ultimate discharge issue.

Shepherd said he did not tell Merriweather he could leave early; he literally denied having spoken each and every phrase attributed to him as approval, direct or indirect. He did recall Merriweather saying "he had to be off a half a day . . . around 11:30 or 12:00," and that all he answered was he would not let him off because of the workload. Sammie Williams testified he heard Shepherd say only "I don't know whether I can let you off or not . . . your job is your business. . . ." He said he did not hear anything else. Sadie Loveless, a secretary in Shepherd's office, testified that after Merriweather asked for

time off, all she heard Shepherd say was "if you get caught up."

As counsel for the Respondent convincingly argues, there are weak points in Merriweather's testimony. In his prehearing affidavit he quoted the supervisor as saying only "that we were behind and had a lot of orders to pull." As a witness at the hearing he argued extensively, offered justifications, and in a sense argued the merits of his case. But there are other facts in the record casting a greater doubt upon Shepherd's denials. There is no basis for discrediting Loveless, who did hear the man speak of "being caught up" in his work. If there was no intention to grant early leave, these words would not have been spoken. And it is a fact Merriweather's work duties had been almost completely discharged by the time he left, for his testimony on that point is not contradicted. Further, time and again during the previous months Shepherd had agreed to the man's requests for early departure. And, of course, Shepherd's story is tainted by the fact it was he who told the man only the month before he would have cause one day to be sorry for his contrary view on the subject of unionism. But the major factor that virtually destroys the claimed affirmative defense is the different treatment the Respondent accorded Terry Williams for committing the very same offense as Merriweather, even if it be assumed Shepherd never gave him permission to leave early.

I find, on the basis of the entire record, that the Respondent discharged Merriweather because of his prounion attitude and thereby violated Section 8(a)(3) of the Act.

E. *Jo Ann Gray*

As already stated this lady was transferred on December 4, 1978, from the main warehouse at the Southaven plant to the distant and much smaller warehouse 8 miles away. Later, sometime in April 1979, she was promoted to supervisory status there. That her transfer was made in part to curb her prounion activities among the much larger group of employees is conceded. Was she, as Respondent now contends, a supervisor at the time of her December transfer? On the basis of the record evidence I find she was not.

The Respondent, via leading questions, attempted to blur Gray's functions after her promotion with what she did before. But all that governs now on this issue is the work she did before the transfer and the very limited authority she exercised at that time. There is no question but that she had no power to hire or fire anybody, to discipline people, to issue reprimands, or in any way to affect the take home pay of any employee. Almost all of the evidence of record as to her duties is limited to her own testimony.

She worked as a warehouseman with one other man—Johnson. "We loaded and unloaded trucks going to and from the distribution center. . . . That's what I did all day . . . With pallet jacks." She punched a timecard and was hourly paid, in grade 8, earning 66 cents per hour more than the other man. She had the same indirect benefits as all other hourly paid employees. Her title was group leader. She said, with no contradiction, that no one had ever told her she had supervisory authority over Johnson or any one else before her transfer. She did the paperwork to record what work was being done. "I told Mr. Johnson what we had to do each day. . . . If a vendor came in to pick up something, then I would tell him you know, to load the vendor. . . . It was just automatic thing." Cf. *Vapor Corporation*, 242 NLRB 776 (1979).

Gray's supervisor was Fischer, in charge of the kind of warehouse work she did bothatthe mainplantand at the satellite location. Fischer was stationed at the second place, and Gray communicated with him and received instructions every day by phone. Occasionally, when Johnson forgot to do so, she would initial his timecard. She never granted a request for time off except with the approval of Fischer. She had no power to transfer employees. Whenever there was more work than she and Johnson could do, she called Fischer who told her to ask some other department supervisor to make a temporary man available. She used to "pick up" two paychecks, and give Johnson his. She made no independent decision as to whether overtime work should be performed or when. When work was delayed and it seemed to her that Johnson was "standing around talking," she did occasionally say to him, "[c]ome on. We've got to get this work done." Gray said that during her last year at Southaven this happened "probably twice at the most."

I find, in the light of the total record, that by transferring Gray on December 4, 1978, the Respondent violated Section 8(a)(3) of the Act.

IV. THE EFFECTS OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. By coercively questioning employees as to their union sympathies, by threatening to discriminate against employees in retaliation for their union activities, by telling employees that their attempt to be represented by a union would be futile, and by denying an employee's request to have a witness present at a disciplinary interview, the Respondent has engaged in and is engaging in violations of Section 8(a)(1) of the Act.

2. By transferring Jo Ann Gray, and by discharging Harry Merriweather, because of their union activities, the Respondent has engaged in and is engaging in violations of Section 8(a)(3) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]